

MEMORANDUM OF LAW

DATE: November 8, 1994

TO: Rich Snapper, Personnel Director

FROM: City Attorney

SUBJECT: Skelly Hearing Issues

Questions Presented

You have requested a legal opinion to respond to a number of questions asked by Civil Service Commissioners as a result of issues raised during disciplinary appeals before the Civil Service Commission ("Commission"). Specifically, those questions are:

1. What are the requirements for a person to be considered an impartial hearing officer?
2. How does the language of the Personnel Manual differ from the impartial hearing officer language negotiated through the meet and confer process?
3. What are the consequences of, and remedies for, a violation of the Skelly procedures?
4. If necessary, how should procedural due process rights be communicated to employees?

Background

During a recent disciplinary appeal before the Civil Service Commission, an appellant argued that the hearing provided to him, pursuant to the California Supreme Court case of *Skelly v. State Personnel Board*, was flawed because the hearing officer who convened and heard the pre-discipline Skelly arguments in the department was the same individual who made the final determination of discipline and the amount of discipline to be imposed. The appellant further argued that this procedure violated his right to a fair and impartial hearing officer under the existing Memorandum of Understanding ("MOU") between the City and the Municipal Employees' Association ("MEA"). The Appointing Authority argued that the Skelly hearing had been properly conducted pursuant to the MOU and that no bias on the part of the hearing officer was demonstrated simply by the hearing officer's minimal participation in the discipline process.

Analysis

Your first question asks simply: What are the requirements for a person to be considered an impartial hearing officer? Initially, a

distinction must be made between the right to an impartial hearing officer at the post-deprivation evidentiary hearing, which is provided by the Commission, and the hearing officer at the pre-discipline hearing, which is defined by the Skelly case. This analysis is bifurcated accordingly.

I. Pre-Discipline Hearing Before the Appointing Authority

A. Requirement for Impartial Hearing Officer

With respect to the pre-discipline hearing, the Skelly case and its progeny stand for the proposition that an employee in the public sector has a vested property interest in his or her employment. The employee is, therefore, entitled to minimal procedural due process safeguards prior to the imposition of any discipline which would result in a significant deprivation of that property right, i.e., a termination or suspension.

Specifically, the Skelly case states:

¶Due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

Skelly v. State Personnel Bd., 15 Cal. 3d 194, 215 (1975) (emphasis added).

" ¶Those requirements are met when the employee is permitted to respond to ¶the authority initially imposing discipline prior to the time disciplinary decision is rendered." Warren v. State Personnel Bd., 94 Cal. App. 3d 95, 99 (1979) (emphasis added). "It has been held that 'the right to a fair and impartial tribunal is not violated by permitting the official who makes the initial disciplinary decision to have the final say in the matter.'" Binkley v. City of Long Beach, 16 Cal. 4th 1795, 1811 (1993).

In light of the foregoing, the Skelly hearing is to be conducted by the appointing authority who makes the decision to discipline. It is not necessary that the hearing be conducted by someone completely lacking any knowledge of the facts of the case being heard. In fact, the Skelly case implies that some knowledge of the facts is essential for a careful evaluation of the employee's representation of the facts.

Pursuant to the Skelly case, the hearing officer is generally an assistant deputy director or above, or the equivalent, depending on the department. These individuals, by virtue of their positions, necessarily have some knowledge of the facts. However, they have not

participated directly in the discipline process, such as the fact-finding or interview process. The fact finding and the initial recommendation for discipline is made by a first or second level supervisor.

B. Personnel Manual and Labor Relations Office Requirements
for Impartial Hearing Officers at Skelly Hearing

Your second question asks if the requirements for impartial hearing officers found in the Personnel Manual are different than the requirements negotiated through the meet and confer process. Article 10 of the MOU between the City and MEA provides in pertinent part:

"Management agrees to follow appropriate procedures during any Skelly hearings prior to the imposition of a suspension, reduction in compensation, demotion or discharge as outlined in Civil Service Rule XI."

Civil Service Rule XI, Section 4 provides:
Section 4. PROCEDURE FOR REMOVAL

The following steps shall be completed by the appointing authority prior to making a final decision to remove any employee in the classified service who has attained permanent status, except when the appointing authority deems immediate removal necessary in order to maintain the safety of the community or the reputation, morale, or harmony of the organization. The employee must be:

(a) Given advance notice of the proposed action which includes a statement of the reasons for the action;

(b) Provided with a copy of the proposed charges and, if practical, a copy of the materials or documents upon which the charges are based;

(c) Given the right to respond either orally or in writing to the appointing authority;

(d) Notified that he or she may have representation at any time during this procedure.

Civil Service Rule XI does not provide any guidance concerning the proper selection of a hearing officer to oversee the hearing granted by Section 4(c). However, should an employee feel, for some reason, that the designated hearing officer is an inappropriate choice, the employee may, pursuant to the MOU, request that the Labor Relations Manager provide an independent hearing officer. The language of Article 67 of

the MOU, in pertinent part, states:

Objective Hearing Officers

Objective Hearing Officers will be assigned to hear disciplinary appeals at the department level. Objective means a managerial employee who has not conducted the fact finding or investigation which lead to the proposed discipline and is not the person recommending the discipline. The primary responsibility for conducting a disciplinary investigation and the resulting advanced notice of disciplinary action when warranted will be delegated by the Appointing Authority to someone other than the individual prospectively responsible for hearing an appeal of such action. The individual delegated the primary responsibility will also sign the Advance Notice. This language is in no way intended to preclude any managerial employee from the normal managerial review of actions recommended within a work unit. (Emphasis added.)

Again, the quoted language from the MOU does not indicate that an objective hearing officer must have no knowledge of the facts. Rather, the hearing officer may not be the person who recommended the discipline or one of the persons intimately involved in the conduct of the investigation. Additionally, the Skelly hearing should not be viewed as an evidentiary appeal. It is merely an opportunity for the employee to present facts in explanation or mitigation prior to the imposition of discipline.

Question three asks about the consequences of, and remedies for, violations of the Skelly process. Remedies for violations of procedural irregularities in a Skelly hearing that affect due process rights may be provided at the evidentiary hearing. The remedy for such irregularities is back pay. *Parker v. City of Fountain Valley*, 127 Cal. App. 3d 99, 116 (1981). As explained in *Parker*:

Since appellant was at that stage of the full evidentiary hearing given a copy of all materials upon which the charges were based, including the supplemental written reports, and was given an opportunity to examine the officers who made the reports, including the officers who gave oral statements to the chief of police, we conclude that the posttermination hearing was

sufficient to satisfy the requirements of
Skelly v. State Personnel Bd., supra, 15 Cal.
3d 194, 215. Consequently, appellant is
entitled to back pay for the period between
the abortive Skelly hearing and the hearing
before the city manager. (Emphasis added.)

Significantly, remedies for violations of Skelly due process rights
do not include reinstatement. Williams v. City of Los Angeles, 47 Cal.
3d 195, 205 (1988). In Williams, the court clearly indicated that the
remedy of reinstatement for Skelly violations was an abuse of
discretion. As noted in Williams, "the constitutional principle at
stake is sufficiently vindicated if such an employee is placed in no
worse a position than if he had not engaged in the conduct." Id. at
205.

Thus, in cases where there has been an incomplete Skelly hearing,
such as where the employee is not given access to, or allowed to respond
to, all the evidence against him or her until the full evidentiary
hearing, back pay for the dates between the initial Skelly hearing and
the civil service hearing is the appropriate remedy.

C. Notification to Employees of Skelly Rights

In response to question four regarding how employees are apprised
of these rights, the enumerated rights are the result of negotiations
determined through meet and confer. Thus, the impartial hearing officer
language is voted on by employees during the MOU ratification process.
Additionally, as noted in Civil Service Rule XI, employees must be
notified that they may have their representatives present at any meeting
from which discipline may flow. It is incumbent upon union
representatives to know the rights to which union members may avail
themselves and to make those rights known to the employees at the time
of representation.

II. Post Discipline Evidentiary Hearing Before the Civil Service Commission

This section again addresses question one regarding impartial
hearing officers. However, at this point, we are addressing only the
issue of Civil Service Commissioners acting as hearing officers at the
Commission appeal. As noted previously, full exposition of the
evidence, and the opportunity to present and cross examine witnesses,
takes place at the full evidentiary hearing before the Commission. The
standards for impartiality change once the Skelly hearing is concluded
and the case comes before the Commission. Again, the Personnel
Regulations do not address the issue of the impartiality of Civil
Service Commissioners acting as hearing officers at this stage, nor does
the MOU. However, one aspect of a fair hearing to which parties are
entitled by due process is the right to be heard by an impartial
adjudicator. Samaan v. Trustees of Cal. State University & Colleges,

150 Cal. App. 3d 646, 661 (1983). A party seeking to disqualify an agency member or hearing officer for bias must show actual bias rather than the mere appearance of bias. *Andrews v. Agricultural Labor Relations Bd.*, 28 Cal. 3d 781, 793 (1981).

Bias and prejudice are not implied and must be clearly established. A party's unilateral perception of bias cannot alone serve as a basis for disqualification. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator's impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice.

Binkley v. City of Long Beach, 16 Cal. App. 4th 1795, 1810 (1993).

The court, in *Binkley*, found the hearing officer had no personal or financial stake in the matter and harbored no personal animosity toward the appellant and therefore must be presumed to be a person of "conscience and intellectual discipline" who would judge the case fairly based on the evidence. *Id.* at 1810. The same presumption must be applied to Civil Service Commissioners when they sit as hearing officers on disciplinary appeals. Commissioners become available to hear appeals on a rotating basis. Appellants, pursuant to proposed Personnel Regulation L3, have the right to select from between the first two Commissioners on the rotation list. However, challenges for cause of a Commissioner must demonstrate one of the criteria for challenge discussed in the *Binkley* case.

Conclusion

The City's personnel policies and procedures carefully provide for the protection of the due process rights of City employees at both the Skelly hearing and the Commission appeal. In the event that there are procedural improprieties during the Skelly process, remedies are provided by law. Should new information come to light prior to the Commission hearing, employees may be given a new Skelly hearing and provided with additional time to address new evidence. The remedy for any violations of the Skelly process uncorrected at the time of the Civil Service appeal is back pay between the time of the abortive Skelly hearing and the appeal before the Commission. Finally, bias of a hearing officer may not be implied, but must be proven through specific facts.

If you have additional questions, please give me a call.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

SAM:mrh:300(x043.2)

cc Cathy Lexin

ML-94-86